IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19329 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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FAIZULLAKHAN MUSTUFAKHAN PATHAN - detenu(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
MR FEROZ H PATHAN for detenu(s) : 1,
MR IM PANDYA GOVERNMENT PLEADER for Respondent(s) : 1, 3,
RULE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 01/11/2006

ORAL JUDGMENT

1.0 By way of this petition, the detenu has challenged the order dated 17.06.2006 passed by Police Commissioner, Ahmedabad in exercise of powers conferred upon him under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("PASA Act" for short).

2.0 Learned Advocate for the detenu has invited my attention to the order of detention dated 17.06.2006 by which detenu was arrested and

sent to District Jail, Jamnagar as well as to the grounds supplied therein. As the grounds of detention, one criminal case is shown as registered against the detenu which pertains to 'Animal Act'. In connection with the said offence, it was alleged that the detenu was found in illegal possession of mutton of bullocks. The detenu was also found in possession of axes, knives etc. On the basis of the aforesaid solitary registered offence, the order of detention came to be passed by the Authority against the detenu.

2.1 He has further submitted that in the order of detention it was stated that the detenu is carrying on anti-social activities and on the basis of aforesaid registered offence, the detaining authority came to the conclusion that the detenu is a habitual offender and of 'cruel mind', and hence, he falls within the definition of Section 2(bbb) of the P.A.S.A. Act and since his activities are prejudicial to the maintenance of 'public order' and 'public health'

the order of detention has been passed against him.

2.2 Learned Advocate for the detenu has raised various grounds. He has submitted that the order under question is required to be quashed on the ground of delay in considering the representation made by the detenu. It was contended that the detenu was arrested on 17.06.2006 and he made a representation dated 27.06.2006 which was rejected by the Authority on 10.07.2006. However, the same was communicated to the detenu on 17.07.2006, and hence, delay of about twenty days is caused by the Authority in deciding and communicating the decision regarding the representation made by the detenu to him. It was also contended that on the basis of only one offence it cannot be said that the activity of the detenu has become detrimental to the maintenance of 'public order'. The other contention about claiming privilege by the detaining authority under Section 9(2) is also raised.

3.0 On the contrary, learned A.G.P. for respondent-detaining Authority has supported the order of detention as well as grounds stated therein and has contended that the Authority has passed the impugned order after taking into consideration all the facts and circumstances of the case, and hence, no case is made out calling for interference of this Court. In support of his case, learned A.G.P. has placed reliance on a decision of the Apex Court in the case of ***"Sitthi Zuraina Begum Vs. Union of India and Others"***, reported in AIR 2003 SC 323. However, learned A.G.P. is not in a position to controvert the aspect of delay caused in considering the representation made by the detenu.

4.0 Heard. Having considered rival contentions fully and going through the record and the grounds of detention, it is necessary to observe that in the matter of detention the prime consideration must not loss sight of the fact that the object of detention law is prevention

and not the punishment. Keeping this very object in mind whenever preventive action is proposed to be taken, the authority concerned must arrive at subjective satisfaction from the material on record objectively. The prime necessity to detain a person under preventive detention is to weigh liberty of a citizen vis-a-vis activities alleged against him. Therefore, the behaviour or the activities alleged must be carefully scrutinized by the detaining authority, because such behaviour is a core and backbone of the preventive action. The apprehension of the detaining authority concerning the future behaviour of the detenu which might be alleged to be prejudicial to the society must pass through the strict scrutiny of the detaining authority. There must be cogent material before the detaining authority indicating tendency of repeating prejudicial, behaviour of the detenu to the society.

4.1 It must not also be lost sight of the fact that in the present case, the detenu is

branded as cruel person within the meaning of Section 2(bbb), of the P.A.S.A. Act. The intention of legislature is very clear from the phraseology used and employed in the statue. It is necessary to reproduce the definition of cruel person as inserted under the P.A.S.A. Act vide Section 2 of the Amending Act No.16 of 1985, the statue lays down as under:-

> "**2(bbb)**. Cruel person" means a person, who either by himself or as member or leader of a gang habitually commits or attempts to commit abets the commission of an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954 (Bom.LXXII of 1954)"

4.2 Now going through the provisions of the definition of "cruel person", from bare reading of the same, it becomes clear that the legislature intended such behaviours to be branded as behaviour of a cruel person when such person either by himself or as member or leader of a gang habitually commits or attempts to commit or attempts an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954. The said Section 8 prescribes penalty for

the contravention of the provisions of the said Act and the important provisions in the said Act are grafted in Section 5 so far as the offence part is concerned whereby slaughtering of animals is made prohibited and restricted and is allowed only on certain conditions. There must be overt behaviour of habitually committing the offences as prescribed under the provisions of Bombay Animal Prevention Act, 1954 on the part of detenu, before the detenu could be branded as "cruel person".

4.3 Habitually committing the offence refers to repetitive tendency of human conduct to commit the same act. It is necessary to refer here to the observations made by the Apex Court in the matter of ***"Gopalanachari Vs. State of Kerala"*** reported in AIR 1981 SC 674, while dealing with terminology like "by habit", "habitual", "desperate", "dangerous, "hazardous" etc. With reference to Section 110 of the Code of Criminal Procedure. The Apex Court observed as under in paragraph No.6,

"**6.** Article 21 insists that no man shall be deprived of his life or personal liberty except according to the procedure established by law. In Maneka Gandhi case(l) this Court in clearest terms strengthened the rule of aw vis a vis personal liberty by insisting on the procedure contemplated by Art. 21 having to be fair and reasonable, not vagarious, vague and arbitrary:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles, J., called "the justice of the common law".

Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are

unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics. I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ.....

To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. [(1978)1 SCC 248 at p.338 (per Krishna Iyer,J.) : (AIR 1978 SC 597)]The constitutional survival of s. 110 certainly depends on its obedience to Art. 21, as this Court has expounded. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the Police cannot be constitutionalised in the context of Art. 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at s. 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g), "by habit a robber....","by habit a receiver of stolen property....", "habitually protects or harbours thieve....", "habitually commits or attempts to commit or abets the

commission of .... ", "is so desperate and dangerous as to render his being at large without security hazardous to the community". These expressions, when they become part of the preventive chapter with potential for deprivation of a man's personal freedom upto a period of three years, must be scrutinised by the court closely and anxiously. The poor are picked up or brought up, habitual witnesses swear away their freedom and courts ritualistically commit them to prison and Art. 21 is for them a freedom under total eclipse in practice. Courts are guardians of human rights. The common man looks upon the trial court as the protector. The poor and the illiterate, who have hardly the capability to defend themselves, are nevertheless not 'non-persons', the trial judges must remember. This Court in Hoskot's case has laid down the law that a person in prison shall be given legal aid at the expense of the State by the court assigning counsel. In cases under s.110 of the Code, the exercise is often an idle ritual deprived of reality although a man's liberty is at stake. We direct the trial magistrates to discharge their duties, when trying cases under s.11(), with great responsibility and whenever the counter-detenu is a prisoner give him the facility of being defended by counsel now that Art.21 has been reinforced by Art.39A. Otherwise the order to bind over will be bad and void. We have not the slightest doubt that expressions like "by habit", "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct

> convincing enough to draw the rigorous inference - that by confirmed habit, which is second nature, the counter-detenu is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperate adjective to stigmatise a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout the person without economic stamina, who in practice gets caught in the coils of s.110 of the Code, although, we as court, cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so, the court cannot be unmindful of social realities and be careful to require strict proof when personal liberty may possibly be the causality. After all, the judicial process must not fail functionally as the protector of personal liberty."
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> **[Emphases supplied]**

4.4 Now referring to the facts of the present case and the material relied upon by the detaining authority, it is clearly borne out that the detaining authority relied upon only one

aspect in scrutinizing the behaviour of the detenu as aforesaid. The filing of criminal case against the detenu for the breach of the provisions of Bombay Animal Preservation Act, 1954 could hardly be said to be a material exhibiting habitual tendency of the detenu to commit such offences. In view of what is observed by the Apex Court in the above said decision of ***"Gopalanachari"*** (supra), confusion which is likely to arise at this juncture is whether a solitary crime registered against the detenu is sufficient to warrant action under preventive detention law. It is required to be explained that the question in this case, does not arise whether a solitary crime registered against the detenu is sufficient to detain the detenu, but question precisely arises having regard the statutory provisions in the shape of Section 2(bbb) whether merely filing of a case, which is still to be tried, the person can be branded as habitual offender, which is a prime requirement for detention under the P.A.S.A. Act as a 'cruel person'. On going through the

documents produced on record it transpires that it is nowhere emanated that the detenu was habitual offender within the meaning of Section 2(bbb) of the P.A.S.A. Act.

4.5 The act of slaughtering and caused to be slaughtering certain animals as envisaged by the Section 5 of The Bombay Animal Preservation Act is made offence under that Act. The habit of doing such acts repeatedly by way of second nature, as a confirmed conduct may attract rigorous inference of habitually committing the said offences. So far as preventive detention laws are concerned phrases employed like "habitual offender" must not be given any laxity in its application to give facts. In the present case, the crime registered against the detenu reveals allegations of transportation of meat of certain animals. Satisfaction of the competent authority must be based on specificity and the concrete inference must be drawn from such grave material which indicates that by confirmed habit, which is a second nature, the

detenu was sure to repeat such offences.

4.6 In the matter of ***"Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta, Commissioner of Police and Others"*** reported in 1995 (3) SCC 237, the Apex Court after referring to the decision of Apex Court in the matter of Gopalanachari (Supra), while discussing Section 2(c) of the PASA Act and more particularly dealing with the phraseology of "habitually committing offence" employed therein observed as under in para-8.

> "**8.** The Act has defined "Dangerous person" in clause (c) of Section 2 to mean a person who either by himself or as a member or leader of a gang habitually commits or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act. The expression "habit" or "habitual" has however, not been defined under the Act. According to The Law Lexicon by P. Ramanatha Aiyar, Reprint Edn. (1987), p.499, 'habitually' means constant, customary and addicted to specified habit and the term habitual criminal may be applied to anyone who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word

'habitually' mean 'usually' and 'generally'. Almost similar meaning is assigned to the words 'habit' in Aiyar's Judicial Dictionary, 10th Edn. p. 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a 'dangerous person' unless there is material suggesting his complicity in such cases which lead to a reasonable conclusion that the person is a habitual criminal. In Gopalanachari v. State of Kerala this Court had an occasion to deal with expressions like "bad habit", "habitual", "desperate", "dangerous", and "hazardous". This Court observed that the word habit implies frequent and usual practice. Again in Vijay Narain Singh v. State of Bihar this Court construed the expression "habitually" to mean repeatedly or persistently and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated, individual and dissimilar acts and that repeated persistent and similar acts are necessary to justify an inference of habit. It, therefore, necessarily follows that in order to bring a person within the expression "dangerous person" as defined in clause (c) of Section 2 of the Act, there should be positive material to indicate that such person is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or Chapter XVII of IPC or under Chapter V of the Arms Act and that a single or isolated act falling under Chapter XVI or Chapter XVII of IPC or

> Chapter V of Arms Act cannot be characterized as a habitual act referred to in Section 2(c) of the Act."
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> **[Emphasis supplied]**

4.7 In above view of the matter, I am of the opinion that the subjective satisfaction arrived at by the detaining authority is vitiated. Hence, in view of the above discussion and in view of the decision of the Apex Court in the case of ***"Gopalanachari"***(Supra) as well as decision of this Court in the case of "***Mustakmiya Jabbarmiya Shaikh"*** (Supra), the order of detention requires to be quashed and set aside on the grounds discussed above.

5.0 In the result, the petition is allowed. The order dated 17.06.2006 passed by Police Commissioner, Ahmedabad is hereby quashed and set aside. The detenu is hereby ordered to be set at liberty forthwith if he is not required in connection with any other case by the Authority. Rule is made absolute. Direct service is permitted.

(K.S. Jhaveri, j.)

Umesh/